

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

NICHOLAS FLOYD HLAVINKA,	)	
	)	
Petitioner,	)	
	)	No. CV-09-3-HU
v.	)	
	)	
WILLIAM McNAMEE, Field	)	
Director of United States	)	
Citizenship and Immigration	)	
Services, Portland, Oregon;	)	
UNITED STATES CITIZENSHIP AND	)	
IMMIGRATION SERVICES,	)	OPINION & ORDER
	)	
Respondents.	)	
	)	

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3 HUBEL, Magistrate Judge:

4 The matter before the court is respondents' motion to dismiss  
5 the petition.

6 **Factual Background**

7 Petitioner Nicholas Hlavinka, a United States citizen, brings  
8 this action challenging the denial by the United States Citizenship  
9 and Immigration Service ("USCIS") of his Petition for Alien  
10 Relative ("I-130 Petition"), filed on behalf of his wife,  
11 Luzviminda Hlavinka. In an I-130 Petition, a citizen or lawful  
12 permanent resident of the United States seeks to establish a  
13 relationship to alien family members who wish to immigrate to the  
14 United States.

15 Mrs. Hlavinka is a citizen of the Philippines. She has been  
16 married three times. Petition ¶ 12. She married her first husband,  
17 Alejandro Donato, in the Philippines in 1982. Id. at ¶ 18; USCIS  
18 Denial of Petitioner's Form I-130, Respondent's Memorandum, Exhibit  
19 C. She states in her affidavit that Donato abandoned her when she  
20 was seven months pregnant with their child. Id.

21 She married her second husband, Wendell Leon Floyd,  
22 approximately 13 years later, in July 1995 (the Floyd marriage).  
23 Mrs. Hlavinka acknowledged to USCIS that she and Mr. Floyd  
24 submitted a fraudulent Filipino death certificate for Donato to the  
25 former Immigration and Naturalization Service ("INS"), along with  
26 a certificate for their marriage stating she was a widow, because  
27 divorce is not permitted in the Philippines and annulments are very  
28

1 expensive and time-consuming. Petition ¶¶ 15, 16; Affidavit of L.  
2 Hlavinka in Support of Form I-485, Respondent's Memorandum, Exhibit  
3 B ("L. Hlavinka Affidavit"), p. 1. Mrs. Hlavinka was admitted to  
4 the United States on February 11, 1997 as the conditional permanent  
5 resident spouse of a United States citizen.

6 Mrs. Hlavinka separated from Mr. Floyd on May 31, 1997; she  
7 states in her affidavit that she left him because he beat her,  
8 psychologically abused her, and threatened to kill her with a gun  
9 he kept in the house. Id. The Columbia County Circuit Court entered  
10 a final decree of dissolution for the Floyd marriage in July 1998.  
11 Id. The USCIS terminated Mrs. Hlavinka's conditional permanent  
12 resident status, based on its finding that Mrs. Hlavinka married  
13 Mr. Floyd in order to obtain an immigration benefit. Petition ¶¶  
14 15, 16.

15 Mrs. Hlavinka married Nicholas Hlavinka on December 30, 1998,  
16 a marriage that Mrs. Hlavinka admits was invalid because she was  
17 still legally married to Donato. L. Hlavinka Affidavit, p. 3. The  
18 Hlavinkas married a second time in June 2002, and a third time on  
19 May 12, 2003. Id.

20 In June 2003, Nicholas Hlavinka filed the I-130 Petition on  
21 behalf of his wife. Petition ¶ 16. The I-130 Petition was denied on  
22 the ground that Mrs. Hlavinka violated 8 U.S.C. § 1154(c) by  
23 entering into the Floyd marriage for the purpose of obtaining an  
24 immigration benefit. Petition ¶ 16. The decision was appealed to  
25 the Board of Immigration Appeals ("BIA"). The BIA found  
26 insufficient evidence to conclude that Mrs. Hlavinka violated 8  
27 U.S.C. § 1154(c), and remanded the case to USCIS. Petition ¶ 17.

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1 On remand, USCIS, through Acting Field Office Director Barbara  
2 Kveton, again denied the I-130 Petition (the FO decision). The FO  
3 decision cited to Mrs. Hlavinka's Application to Register Permanent  
4 Residence or Adjust Status ("I-485 Petition") in which she stated:

5 I engaged in misrepresentation when my first US citizen  
6 husband, Wendell Leon Floyd, and I submitted [fraudulent]  
7 [sic] death certificates for my first husband, Alejandro  
8 Donato, to convince the US Embassy that Mr. Floyd and I  
9 were validly married in order for me to obtain my  
10 immigrant visa to enter the United States.

11 Respondent's Memorandum at Exhibit C, p. 3 (quoting Exhibit A, p.  
12 5). USCIS concluded that by Mrs. Hlavinka's "own admissions in her  
13 affidavits and on her I-485 Petition, and upon review of the entire  
14 record of proceeding it is clear that [Mrs.] Hlavinka attempted to  
15 enter into a marriage to evade immigration law." Id. at p. 4.

16 On October 25, 2007, the BIA affirmed the FO decision denying  
17 Hlavinka's I-130 Petition. Respondent's Memorandum, Exhibit D. Mr.  
18 Hlavinka petitions for review in this court.

### 19 Standard

20 The Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*,  
21 contains several anti-fraud provisions that bar entry to the United  
22 States. The most expansive is the general fraud bar provided at 8  
23 U.S.C. § 1182(a)(6)(C)(i), which bars an "alien who, by fraud or  
24 willfully misrepresenting a material fact, seeks to procure (or has  
25 sought to procure or has procured) a visa, other documentation, or  
26 admission into the United States or other benefit provided under  
27 this Act..." The marriage fraud bar, codified at 8 U.S.C. §  
28 1154(c), applies when "the Attorney General has determined that the  
alien has attempted ... to enter into a marriage for the purpose of  
evading the immigration laws." Petitioner concedes that it is

1 nearly certain, given his wife's admissions, that Mrs. Hlavinka  
2 will be subject to the general fraud bar, but nonetheless asserts  
3 that the marriage bar is inapplicable.

4 Judicial review of the BIA's determination that an alien  
5 committed marriage fraud is "an intrinsically fact-specific  
6 question" that is reviewed under a substantial evidence standard,  
7 with the agency having the burden of producing substantial evidence  
8 in support of its determination. Nakamoto v. Ashcroft, 363 F.3d  
9 874, 881 (9<sup>th</sup> Cir. 2004). The court must determine whether  
10 substantial evidence supports a finding by clear and convincing  
11 evidence that Mrs. Hlavinka committed marriage fraud. Id. at 882,  
12 citing Khodagholian v. Ashcroft, 335 F.3d 1003, 1006 (9<sup>th</sup> Cir.  
13 2003).

#### 14 Discussion

15 The Petition alleges that respondents erred when they  
16 "concluded that document fraud alone conclusively establishes  
17 marriage fraud for purposes of [8 U.S.C. § 1154(c)]." Petition ¶  
18 20. The marriage fraud bar, 8 U.S.C. § 1154 (c), provides that no  
19 petition for immigrant status shall be granted if:

20 (1) the alien [sought] an immediate relative or  
21 preference status as the spouse of a citizen of the  
22 United States ... by reason of a marriage determined by  
23 the Attorney General to have been entered into for the  
24 purpose of evading the immigration laws, or (2) the  
Attorney General has determined that the alien has  
attempted or conspired to enter into a marriage for the  
purpose of evading the immigration laws.

25 See also 8 C.F.R. § 204.2(a)(1)(ii) (USCIS may not approve a visa  
26 petition for an alien who "has attempted or conspired to enter into  
27 a marriage for the purpose of evading the immigration laws.")

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1 Respondents argue that the agency did not conclude that Mrs.  
2 Hlavinka's document fraud alone established marriage fraud; rather,  
3 they argue that in its denial of the I-130 petition, the agency  
4 found that "the entire record of proceeding" established a  
5 conspiracy to enter into a marriage for the purpose of evading the  
6 immigration laws. See Respondents' Memorandum, Exhibit C, p. 3.  
7 Likewise, respondents argue, the BIA did not, in its October 25,  
8 2007 decision, conclude that Mrs. Hlavinka's document fraud,  
9 standing alone, constituted marriage fraud, but rather that her  
10 "bigamous marriage to Mr. Floyd was an attempt to enter into a  
11 marriage for purposes of evading the immigration laws." Id. at  
12 Exhibit D. Therefore, the government argues, both USCIS and the BIA  
13 determined that it was Mrs. Hlavinka's bigamous marriage, not just  
14 the falsified death certificate and marriage certificate, that  
15 constituted marriage fraud for purposes of 8 U.S.C. § 1154(c).

16 Petitioner argues that the standard for determining, under §  
17 1154(c), whether marriage fraud has been committed is not whether  
18 the marriage in question was *legally valid*, but rather whether the  
19 marriage was entered into without the intent to establish a life  
20 together. Petitioner cites several cases from this jurisdiction to  
21 this effect.<sup>1</sup>

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23 <sup>1</sup> Lutwak v. United States, 344 U.S. 604 (1953) (marriage is  
24 bona fide when parties have undertaken to establish a life  
25 together); Bark v. INS, 511 F.2d 1200, 1238 (9<sup>th</sup> Cir.  
26 1975) (marriage a sham if bride and groom did not intend to  
27 establish a life together at the time they were married); Garcia-

1       Petitioner particularly relies on Johl v. United States, 370  
2 F.2d 174, 177 (9<sup>th</sup> Cir. 1966) and Nakamoto. In Johl, the court held,

3       The immigration law, in granting advantages to those who  
4       have married American citizens, is not talking about

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5       Jaramillo v. INS, 604 F.2d 1236, 1237 (9<sup>th</sup> Cir. 1979) ("It is  
6       within the authority of the INS to make inquiry into the marriage  
7       to the extent necessary to determine if it was entered for the  
8       purpose of evading the immigration laws. A marriage is a sham if  
9       the bride and groom did not intend to establish a life together  
10      at the time they were married. Conduct and lifestyle before and  
11      after marriage is relevant to the extent it aids in determining  
12      the intent of the parties at the time they were married."); Pena-  
13      Urrutia v. INS, 640 F.2d 242 (9<sup>th</sup> Cir. 1980) ("It is entirely  
14      appropriate for the INS to [inquire] into the marriage to the  
15      extent necessary to determine whether it was entered into for the  
16      purpose of evading the immigration laws. A marriage is a sham if  
17      the bride and groom did not intend to establish a life together  
18      at the time they were married."); United States v. Tagalicud, 84  
19      F.3d 1180, 1185 (9<sup>th</sup> Cir. 1996) ("a marriage [is] a sham if the  
20      bride and groom did not intend to establish a life together at  
21      the time they were married"); Oropeza-Wong v. Gonzales, 406 F.3d  
22      1135 (9<sup>th</sup> Cir. 2005) ("To determine the bona fides of the  
23      marriage, the proper inquiry is whether [the parties] intended to  
24      establish a life together at the time they were  
25      married.") (applying 8 U.S.C. § 1186a(c)).  
26  
27  
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1 ceremony or legality--the taking of those steps which  
2 enable a couple lawfully to live together in a marital  
3 relationship. It is talking about the marital  
4 relationship itself--an actual joining together as  
5 husband and wife.

6 In Nakamoto, the immigrant lived with her second husband and  
7 their son in Hawaii. The INS commenced removal proceedings against  
8 Nakamoto, alleging that under 8 U.S.C. §227(a)(1)(G)(ii), Nakamoto  
9 had procured her visa by fraud. Nakamoto had initially entered the  
10 country after marrying her first husband, Del Rosario, who was a  
11 United States citizen. Nakamoto and Del Rosario's courtship had  
12 commenced with five years of letters. Del Rosario then proposed and  
13 flew to the Philippines to marry Nakamoto in 1992. Del Rosario  
14 stayed in the Philippines for four days after the marriage ceremony  
15 before returning to Hawaii. After Del Rosario returned to Hawaii,  
16 the relationship began to deteriorate. Shortly after Del Rosario  
17 left, Nakamoto discovered that Del Rosario had a girlfriend in  
18 Hawaii. Nakamoto refused to go to Hawaii and wrote to Del Rosario  
19 requesting a divorce.

20 The marriage was not dissolved, and Nakamoto continued to  
21 write to Del Rosario for the next two years. In 1995, three years  
22 after the marriage, Nakamoto agreed to join Del Rosario in Hawaii.  
23 They spent two nights together in Hawaii, but did not live together  
24 after that. Nakamoto subsequently met Daryl Nakamoto and gave birth  
25 to their son. In 1997, Nakamoto brought suit to dissolve her  
26 marriage to Del Rosario; Del Rosario counterclaimed for an  
27 annulment of the marriage. In April 1997, the Hawaii family court  
28 entered a decree of annulment on the ground that Nakamoto had



1 fraudulently obtained Del Rosario's consent to the marriage.<sup>2</sup>

2 The issue in Nakamoto was whether she was subject to removal  
3 on the ground that she had entered into the marriage with Del  
4 Rosario for the purpose of obtaining an immigration benefit. 363  
5 F.3d at 877. The Immigration Judge (IJ) determined on September 10,  
6 1999, that the INS had met its initial burden of proof and that the  
7 Hawaii family court's annulment order and the letters submitted as  
8 evidence "prove[d] that the marriage was a sham from the start."  
9 Id. at 878. In denying Nakamoto relief from removal, the IJ  
10 acknowledged that Nakamoto had "exceptional and outstanding  
11 equities" of family ties and a good work history, and that her  
12 removal would "cause terrible harm to [her] United States citizen  
13 son." Id. Nevertheless, the IJ wrote that "she could not show by a  
14 preponderance of the evidence that she did not enter into the  
15 marriage for purpose of evading immigration laws," because "[t]here  
16 [was] little or no conduct before or after the marriage to show  
17 commitment. The time they spent together is negligible and there  
18 are no joint assets." Id.

19 The Ninth Circuit affirmed, stating that the "focus of our  
20 inquiry is whether Nakamoto and Del Rosario intended to establish  
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22 <sup>2</sup> The Hawaii family court's conclusion was based on evidence  
23 that Nakamoto made misrepresentations with the intent to induce  
24 Del Rosario to marry her and that Del Rosario relied on  
25 Nakamoto's representations to his detriment. 363 F.3d at 883.  
26 This is all the detail that can be gleaned from the Ninth Circuit  
27 opinion.  
28

1 a life together at the time they were married." Id. at 882, citing  
2 Bark, 511 F.2d at 1201. The court noted that although evidence that  
3 the parties separated after the marriage was relevant to  
4 ascertaining whether they intended to establish a life together at  
5 the time of marriage, evidence of separation cannot, by itself,  
6 support a finding that the marriage was not bona fide. Id.

7 The court examined the objective evidence that supported a  
8 finding that the couple entered into the marriage with an intent to  
9 establish a life together, and the evidence suggesting that  
10 Nakamoto "married Del Rosario for immigration purposes, and that  
11 the marital agreement was not fulfilled." Id. But the evidence the  
12 court found to be the most "daunting hurdle" for Nakamoto was the  
13 Hawaii family court's judgment of annulment. Id. at 883. Although  
14 the annulment itself was "not dispositive," the Hawaii court's  
15 finding that Del Rosario's consent to the marriage had been  
16 obtained by fraud was entitled to full faith and credit. Id. The  
17 court concluded that substantial evidence supported a finding by  
18 clear and convincing evidence that Nakamoto committed marriage  
19 fraud. Id. at 882.

20 Petitioner argues that document fraud cannot conclusively  
21 establish marriage fraud under 8 U.S.C. § 1154(c) because document  
22 fraud says little or nothing about the defining question: the  
23 intent of the parties to make a life together.

24 The FO decision found that under the Family Code of the  
25 Philippines (quoted in the decision) Mrs. Hlavinka could have filed  
26 a Declaration of Presumptive Death prior to the Floyd marriage.  
27 Under the Family Code, such a declaration makes a subsequent  
28 marriage valid if the previous spouse has been absent for four

1 consecutive years and the declarant has "a well-founded belief that  
2 the absent spouse was already dead." In case of disappearance where  
3 there is danger of death, an absence of two years is sufficient.

4 The FO decision concludes:

5 the beneficiary could have filed for a Declaration of  
6 Presumptive Death prior to her marriage to Wendell Floyd  
7 in order to be legally free to marry. ... Instead, the  
8 beneficiary chose to claim the status as a widow on her  
marriage license, and the beneficiary and petitioner  
chose to submit a fraudulent death certificate ... in  
support of the beneficiary's visa petition.

9 Exhibit C p. 2-3. An implication of this discussion is that failure  
10 to take this simple step reflects a lack of intent to make a life  
11 together.

12 The decision also states that the Petition for Dissolution and  
13 Annulment filed in Columbia County Circuit Court, dissolving the  
14 Floyd marriage, was submitted to the USCIS by Mr. Floyd, and was  
15 accompanied by an affidavit signed by Mr. Floyd stating that his  
16 marriage to Mrs. Hlavinka was fraudulent. The decision concludes:

17 [A] review of the entire record of proceeding indicates  
18 that the beneficiary conspired to enter into a bigamous  
19 marriage with Wendell Floyd for the purpose of evading  
20 immigration law and entering the United States. She knew  
21 she was not legally free to marry Wendell Floyd as she  
22 was already married at the time. If the beneficiary had  
the intention of pursuing a true spousal relationship  
with Wendell Floyd, she would have taken the necessary  
legal steps to dissolve her first marriage.

23 Id. at p. 3-4. The respondents assert that the petition must be  
24 dismissed because Mrs. Hlavinka explicitly admitted on her I-485  
25 that she "submitted fra[u]dulent death certificates for [her] first  
26 husband" in order to convince the United States that she was  
27 "validly married in order for [her] to obtain [her] immigrant visa  
28 to enter the United States." Petition ¶ 18; Respondent's

Memorandum, Exhibit A p. 5.

Considering the record as a whole, I conclude that USCIS has met its burden of showing that Mrs. Hlavinka and Mr. Floyd did not have the intent to make a life together. Besides the fraudulent death certificate, there is the affidavit from Mr. Floyd stating that he was tricked into marrying Mrs. Hlavinka, and that the marriage was fraudulent, the fact that Mrs. Hlavinka resided with Mr. Floyd for only about three months; and the fact that Mrs. Hlavinka remained in the United States after the Floyd marriage was dissolved and then married Mr. Hlavinka a few months after the final decree was entered and USCIS revoked her conditional permanent resident status.

### Conclusion

Respondents have carried their burden of demonstrating that substantial evidence supports a finding, by clear and convincing evidence, that Mrs. Hlavinka and Mr. Floyd did not have the intent to make a life together, and therefore that Mrs. Hlavinka committed marriage fraud.

Respondents' motion to dismiss (doc. # 11) is GRANTED. Petitioner's motion for summary judgment (doc. # 21) is DENIED AS MOOT.

IT IS SO ORDERED.

Dated this 6<sup>th</sup> day of August, 2009.

/s/ Dennis James Hubel

Dennis James Hubel  
United States Magistrate Judge